IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 05.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.Nos.762 of 1997

and

Cross Objection No.31 of 1998

S.A.No.762/1997

Prabhalachandra Raj .. Appellant (PLAINTIFF)

Vs.

1.Padmanabhan
2.Jayakumar
3.Sivakumar
4.Ravikumar
5.Kuppuraj
6.Susila Ammal .. Respondents (DEFENDANTS)

Cross Objection No.31 of 1994

1.Padmanabhan
2.Jayakumar
3.Sivakumar
4.Ravikumar .. Cross Objectors (RESPONDENTS 1 TO 4)

vs.

1.Prabhalachandra Raj
2.Kuppuraj
3.Susila Ammal .. Respondents (APPELLANT & RESPONDENTS 5 & 6)

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Prayer: This second appeal and cross-objection have been preferred U/S 100 CPC and under order 41 Rule 22 CPC respectively against the decree and Judgment dated 19.09.1996, passed by the Principal Subordinate Judge, Cuddalore, in A.S.No.31 of 1994 and cross-objection, which were preferred against the judgment and the decree dated 7.1.1994 made in O.S.No.1025/1988 on the file of the Additional District Munsif, Cuddalore.

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As per S.A.No.762/1997

For Appellants : Mr.S.Venkateswaran (in SA & for Respondents in Cross Objection)

For Respondents : Mr.R.Yashod Varadhan (for R1 to R4) & Cross Objections

JUDGMENT

This second appeal and cross-objection have been preferred against the decree and judgement in A.S.No.31/1994 on the file of the Principal Subordinate Judge, Cuddalore. The plaintiff, who has lost his case before the courts below is the appellant herein. The suit is for declaration and also for mandatory injunction.

2. The averments in the plaint in brief relevant for the purpose of deciding this appeal are as follows:-

2(a) The plaintiff is the owner of the shop bearing Door No.79-A, Lawrence Road, Tirupapuliyur, within the jurisdiction of this court. The plaintiff is doing business in electrical goods for the past 30 years and more under the name and style of 'Suseela Machinery and Electricals'. Door No.29-A is facing south. The wall on the East and West of the said building forms part of the building itself. The plaintiff is the owner of the superstructure including the walls both on the East and West. On the East of the plaintiff's building bearing door No.79-A is the building bearing door No.80. The said building was previously occupied by one D.Kannialal Dadha Sait. He was running a sweetmeat stall there. The shop of the plaintiff is provided with corrugated zinc sheet roof supported by trusses. The roof is sloping one part towards east and the other on the west. At the entrance, on the roadside, the plaintiff has installed an iron girder running East to West on the road side. The plaintiff has planted zinc sheets on the girders forming top for his shop, which slopes south. The zinc sheets are fixed on the girder by putting up a masonry wall. The plaintiff has also proved a rolling shutter for his shop, which is supported by iron angles imbedded in eastern and western walls. From the physical appearance of the availability of the iron rods on the eastern wall of the plaintiff's ship, will clearly show that the plaintiff is the owner of the eastern wall also.

2(b) Some two years back the said Kannialal Sait put up a small wall on the zinc sheet roof forming the top of the plaintiff's shop with the permission of the plaintiff, which is item 2 to the plaint schedule. The zinc sheet top is sloping North to South. The previous owner Kannialal Sait put up a wall on the

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eastern extremity of the said top, measuring about 12 feet north to south and 6" east to west, with the consent and permission of the plaintiff. Below the above mentioned wall there is the eastern mother wall of the plaintiff's shop. The said wall was put up and erected by the plaintiff's father about 40 years back. The roof of the plaintiff's shop is resting on the eastern wall as well as in the western wall. The father of the plaintiff and after him, the plaintiff have been in continuous possession of the suit wall (item No.1) for the past 40 years and more in their own right. In any event, the plaintiff and his predecessors in title have prescribed title by adverse possession to the same.

2(c) The 1st defendant is the father of the defendants 2 to 4. They have occupied door No.80 some four months back. The defendants have no right to the eastern wall of the plaintiff's shop. The defendants illegally and unlawfully, in denial of the plaintiff's right, threatened to put up construction on the eastern wall of the plaintiff's shop. The defendants have demolished a portion of the pial belonging to the plaintiff. The plaintiff resisted the same. It has erupted into a case and the matter is pending before the police. The defendants have unauthorisedly put up supporting reepers running east to west for their roof. The said roof is sloping north to south. The defendants have no right to do so. Their action is illegal, unlawful and highhanded. In continuation of the highhanded action, the defendants preferred a false complaint to the police and the plaintiff was arrested. The plaintiff is taking suitable action against the defendants. The plaintiff submits that the defendants have no right, title or interest in the eastern wall. Hence the suit.

3. The first defendant has filed the written statement, which was adopted by the other defendants, as follows:-

3(a) The plaintiff is carrying on business in door No.79-A for the past 30 years as alleged in the plaint. The business belongs tot he plaintiff's brothers and mother also viz. Kuppuraj, Kumar and Susheela Ammal. The plaintiff ought to have impleaded them as co-plaintiffs. The suit is bad for non-joinder of necessary parties. The suit wall does not form part of the building. The entire building in the possession of the plaintiff is roofed with tin sheet. The tin sheet slopes southwards and there is no requirement of any support on the suit wall. The suit wall which is the western wall of the defendant's building belongs to the defendant. It is false to state that the plaintiff has put up any masonry construction to rest his zinc sheet.

3(b) The defendant filed a plan along with the written statement for better appreciation of the facts. The physical featurs do not indicate that the suit wall belongs to the

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plaintiff. There is a rafter placed along with south north wall to the rest the zinc sheet. If the wall belonged to the plaintiff, there is no need to place a rafter along the said wall. The trusses for the zinc sheet roofing are placed on walls which are turned inwards and not on the suit wall. Upon the above east-west supporting wall for zinc sheets that slope Southwards at the plaintiff's portion an 'ornamental border' has been laid is such a way that it stops short of the eastern wall portion, being conscious of the fact that the wall belongs to the defendant. The eastern side of the rolling shutters is embedded on a 5" wall constructed west of the suit wall. If the wall belonged to him, the shutters would have been fixed on the eastern side of the suit wall itself. The wall plates that support the AC sheet in the front portion of the defendant's shop is embedded 9" into the disputed wall. There is an upstairs portion for which steps have been built east of the disputed wall. The stairs portion also existed long before the plaintiff or his father occupied the shop bearing Door No.79-A and the stairs could not have been constructed without a closing wall on the west.

3(c) East of the shop bearing door No.79-A, is the defendant's building which bears door No.80. The defendant's building measures 14' east-west and about 55' south to north. 17' further north was used for the drain water to stagnate and later a septic tank was also constructed. Now, in that portion a small shed has been put up by the defendant. In all, the area measures 14' x 72'. The entire extent existed originally as Railway Poramboke over which this defendant's father encroached and put up the construction more than 50 years back. The walls on the east and the west of the construction were both put up by the defendant's father only. The building with the walls of the defendant existed long before the plaintiff or his father came on the scene. The building comprises of a Mangalore titled roof portion on the North, a terraced roof portion and a AC sheet roof. This defendant's father was running a hardware shop for several years till he closed the business and rented out a portion to Kanhialal Dada some time around 1952. The whole built-up portion of 14' x 55' was rented out to him for the first time only on 5.2.1960. The document refers to east-west extent of 14'. Periodically, the leases were renewed and the last registered document was executed on 8.9.1981 in favour of this defendant's mother Jayalakshmi Ammal.

3(d) No portion of construction was put up by the defendant's lessee Kanhaialal as mentioned in the plaint. The averment that plaintiff granted permission for Kanhailal to raise a wall over the plaintiff's zinc sheet in an extent of 6' x 6' is false. Such a false averment is made only to explain away the defendant's building at the first floor whose roofing is supported

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by wells both on the east and west. The said physical feature of the existence of the staircase and the 1st floor construction will also disprove the plaintiff's claim as the owner of the eastern wall.

3(e) The defendant obtained eviction of his tenant peacefully on 27.5.1987 and this defendant was making preparations to start a hotal by carrying out interior decoration. On 21.08.1988 the defendant planted steel pipes at the entrance of the building to mount a name-board for the proposed hotel. The plaintiff made no objection at that time but on 5.9.1988, the plaintiff unlawfully removed the steel pipe that was planted just opposite the wall east of the plaintiff's shop and also assaulted the defendant and his sons. After having committed the wrongful act of assault and trespass, the plaintiff has accused the defendant and his son for having committed trespass and demolished a portion of pial. No such pial existed and there was no need to demolish it. The plaintiff has falsely alleged that the defendant had demolished a portion of the pial. The plaintiff looted the defendant's shop and as a sequel to it, police has initiated criminal action against the plaintiff.

3(f) The suit item No.1 is the defendant's wall and the plaintiff's claim for title is untenable. Suit Item No.2, which is a construction put up over the ground floor, has been in existence since 1994 or 1995. Originally it was rented out to a third party who was running a shop under the vilasam 'Daniel Opticals' and it changed hands to an automobile electrician and lastly to Kanhaialal Dada, who was previously occupying only the ground portion as a tenant. It is travesty of fact to state that item No.2 was constructed with the permission of the plaintiff by Kanhaialal Dada. The defendant's building, inclusive of item 2 has been in existence for more than the statutory period and he has thus prescribed title by way of adverse possession. The claim for mandatory injunction is therefore unsustainable. The defendants 2 to 4 are unnecessary parties to suit. Hence, the suit is liable to be dismissed with costs.

4. On the above pleadings the learned trial judge has framed six issues for trial. P.W.1 to P.W.4 were examined and Ex.A.1 to A.11 were marked on the side of the plaintiff. On the side of the defendants, D.W.1 was examined and Ex.B.1 to B.4 were marked. A Commissioner was appointed and he has filed Ex.C.1 & C.3 reports and Ex.C.3 & C.4 plans.

5. After going through the oral and documentary evidence let in by both sides, the learned trial judge has come to the conclusion that the plaintiff is entitled to a declaration in respect of plaint item No.1 and dismissed the relief of mandatory

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injunction holding that the plaintiff can claim only compensation under the principal of law of acquisition. Aggrieved by the findings of the learned trial judge, the defendant 1 to 4 preferred an appeal in A.S.No.31/1991 and the plaintiff has also preferred a cross appeal before the Court of Subordinate Judge, Cuddalore. The first appellate judge after due deliberation of the rival submissions made by the parties concerned has dismissed the appeal confirming the decree and judge and has also dismissed the cross appeal but with costs. Aggrieved by the findings of the learned first appellate judge, the first plaintiff has preferred S.A.No.762/1997 and the defendants 1 to 4 have preferred cross objection No.31/1998.

6. The substantial questions of law involved in this appeal are as follows:-

"a) Whether in law the courts below are right in overlooking that permission given to the respondents could be withdrawn at any time?

b) Whether in law the courts below are right in awarding only damages instead of mandatory injunction after decreeing the suit for declaration?

7.The Points:-

7(a) The plaint item No.1 in the plaint schedule property is the eastern wall in Door No.79-A, a shop at Lawrence Road, Tirupapullyur. In respect of the plaint schedule property item No.1 eastern wall in Door No.79-A the plaintiff has sought for declaration of title. The plaint schedule Item No.2 is an additional construction over eastern wall of Door No.79-A with a measurement of 6 feet x 12 feet x 3/4 foot.

7(b) The plaintiff relied on Ex.B.1 lease deed dated 5.2.1960 entered into between the defendant's father and his tenant Kannialal Dadha and contended that the lease deed was entered into in respect of Door NO.80 which situate east of door No.79-A belongs to the plaintiff. In the boundaries described to the property leased out under Ex.B.1 to the schedule it is categorically mentioned that Door No.80 is east of the shop belonging to the plaintiff's father Chittibabu.

7(c) The learned counsel for the appellant contended that Door NO.80 is situated east of plaintiff's property. But it is not exclusively stated that the eastern wall of the plaintiff belongs to the plaintiff. This contention of the learned counsel appearing for the appellant cannot be upheld because even in his own document Ex.B.1 to B.4 it has been clearly stated that the defendant's property is situated east of the shop belongs to the plaintiff's father Chittibabu. If the eastern wall i.e., wall of the shop belongs to the plaintiff which separates the defendant's property on the east bearing door No.80 is a common wall or a wall

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belongs to the defendant then it would have been described in the schedule to Ex.B.1 to B.4 while describing the eastern boundary for Door No.80 as east of the common wall or east of the wall belongs to the defendant. But it has been specifically mentioned in the document produced by the defendant himself viz. Ex.B.1 to B.4 that the defendant's door NO.80 is situated east of the shop belongs to the plaintiff's father Chittibabu. It is further pertinent to note that there are description of the property to the schedule to Ex.B.4 that door No.80 belongs to the defendant is on the east of Chittibabu's building constructed of granites. This itself will clearly go to show that only to east of the building of the plaintiff situated, door No.80 belonging to the defendant.

7(d) The defendant who was examined as D.W.1 before the trial Court in the chief examination itself would admit that the disputed wall is situated on the west of his shop bearing door No.80. In the cross examination he would admit that boundary description under Ex.B.1 to B.4 for Door No.80 is correct and he would further admit that Chittibabu is the father of the plaintiff and the plaintiff's building was constructed even in the year 1950 itself.

7(e) A Commissioner was appointed in this case and he has filed Ex.C.1 & C.3 reports and Ex.C.2 & C.4 plans. In Ex.C.3 the learned Commissioner has noted the physical features of the suit property as follows:-

> "The name board of the petitioner's shop covers both the eastern as well as western walls. In the eastern wall of the petitioner's shop iron rods are fixed for fixing the rolling shutter. The rolling shutter of the petitioner's shop is imbedded in the western as well s eastern walls. At the bottom of the pial in which the rolling shutter of the petitioner's shop is fixed a small portion was smashed. "

If the eastern wall is a common wall or wall exclusively belong to the defendant then he would not have permitted the plaintiff to fix the iron rods for fixing the rolling shutter on the eastern wall. The findings of the courts below that the plaintiff is entitled to a declaration for title to eastern wall in door No.79-A suit item No.1 does not warrant any interference from this Court.

7(f) With regard to the relief of mandatory injunction in respect of item No.2 for removing the additional construction over the plaint item No.1 ie. eastern wall of door No79-A, with measurement of 6 feet x 12 feet x 3/4 foot over the suit schedule Item No.1, cannot be allowed as rightly held by the court below because admittedly the additional construction was put up by tenant viz.Kannialal Sait. This fact has been admitted by P.W.1,

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the plaintiff himself. In the cross-examination, P.W.1 would admit that Sait was in door No.80 as a tenant only at his request the additional structure was put up to prevent rain water and that the permission was granted only in the year 1986 on the undertaking given by the Sait that he will remove the same at the time of vacating the premisses. But the said Sait vacated the premisses in the year 1988 without removing the additional structure put up by him over plaint item No.1. P.W.1 would further admit that he has not issued any notice to Sait for removing the additional construction. Admittedly the said additional structure described as plaint Item No.2 was not put up by the defendant.

7(g) Per contra, D.W.1 would depose that the plaint item No.2 was put up by his father some 20 years back. A pertinent point to be noted in this appeal is that to substantiate the claim of the plaintiff that only with his permission Kannialal Sait had put up the Additional structure ie. plaint item No.2 over plaint item No.1 wall the plaintiff has not chosen to examine Kannialal Sait on his side as a witness to prove that the additional structure ie. Item No.2 to the plaint schedule was put up him (Sait) with the plaintiff's permission. The putting of Item No.2 over item No.1 even according to plaintiff (P.w.1) is to prevent rain water entering into the defendant's property. The plaintiff has permitted the defendant or his tenant to construct an additional structure i.e., plaint item No.2 over his eastern wall i.e. Plaint Item No.1. Under such circumstances, the findings of the Courts below that the plaintiff is entitled only to compensation under the principle of law of acquisition, in my opinion cannot be interfered with. So, the cross-objection preferred by the plaintiff over the decree and judgment of the first appellate Court in respect of the second relief of mandatory injunction is liable to be dismissed. Points are answered accordingly.

8. In the result, both the second appeal and cross-objections are dismissed confirming the decree and judgment in A.S.No.31/1994 and cross-objection, on the file of the Court of Principal Subordinate Judge, Cuddalore. Under the circumstance of the case parties shall bear their own costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

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To,

1. The Principal Subordinate Judge, Cuddalore.
2. The Additional District Munsif, Cuddalore.
3. The Section Officer,
VR Section, High Court, Madras.

1 cc to Ms. Hema Sampath, Advocate, sr. 13525
1 cc to Mr.R. Yashod Vardhan, Advocate, sr. 13932

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PV (CO)
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